



Legislation Text

File #: 2020-0208, **Version:** 1

DATE: May 19, 2020

SUBJECT:

RESOLUTION ESTABLISHING TEMPORARY RENT DEFERRAL PROGRAM FOR QUALIFYING FIXED RENT TENANTS AND TARIFF FEE PAYING TENANTS ALLOWING A TEMPORARY SUSPENSION OF CERTAIN RENTAL AND TARIFF PAYMENTS WITH CONDITIONS AND DIRECTION TO STAFF, AS NECESSARY

EXECUTIVE SUMMARY:

At the April 8, 2020 Special Meeting of the Board of Port Commissioners (Board), the Board adopted a Resolution establishing a temporary rent deferral program for qualifying concession rent paying tenants, tenants that report their gross sales to the District each month, and Seaport Village tenants (collectively, Concession Tenants) to assist them in sustaining economic viability through the COVID-19 public health crisis (Concession Tenant Rent Deferral Program). As the pandemic continues, staff is returning to the Board to address numerous requests for rent relief from fixed rent tenants and tariff fee paying tenants similarly impacted by the effects of COVID-19. Staff has worked in partnership with the San Diego Port Tenants Association (SDPTA) to develop a program that would offer a temporary rent deferral for qualifying fixed rent tenants and tariff fee paying tenants experiencing financial hardship due to the public health crisis.

The proposed program allows for up to a three-month deferral of 50% of the fixed monthly rent for all fixed rent tenants, including those that pay both concession and fixed rent but excluding the San Diego International Airport, to be paid back over a six-month period beginning in January 2021 with no interest or late charges. Unlike the deferral offered to the Concession Tenants, the deferral period would be for up to three consecutive rental payment months between June and December 2020 (i.e., rental months of May - November). A "fixed rent tenant" is a tenant that pays a fixed amount of rent to the District each month, which may be in the form of improvement rent or predetermined monthly amount of rent, and also includes some of the Concession Tenants who may pay a hybrid of concession rent and improvement rent for the rental of District owned improvements. Examples of fixed rent tenants are boatyards, easement holders (e.g., existing tenants, utilities, and other third parties), landscape tenants, marine tenants, pier tenants, rental car tenants, maritime tenants and tenant parking. For the purposes of this program, a fixed rent tenant does not include the San Diego International Airport.

The economic impact of the proposed program to the District is expected to be felt mostly in late Fiscal Year 2020 (through June 30, 2020) and the first six months of Fiscal Year 2021, with all deferred amounts anticipated to be repaid by the end of Fiscal Year 2021. If every eligible tenant participates, the total impact in Fiscal Year 2020 could be up to approximately \$1,021,433 and an

additional \$2,042,867 in deferred rent to the District in Fiscal Year 2021, for a total maximum deferral of \$3,064,300 to be repaid in Fiscal Year 2021. As qualification for the program, tenants must be considered a tenant in good standing under Board Policy No. 355 and must apply for - and if received, accept - state and federal aid under one or more programs established to mitigate the economic impacts of COVID-19.

In addition, the proposed program would offer qualifying tariff fee paying tenants the ability to pay tariff fees up to 30 days late with no interest or late fees during each of the tariff paying months of May 2020 through January 2021 for tariffs incurred during the months of April through December. This would include commercial fisherman who pay for marina slips at Tuna Harbor via tariff fees. The District receives approximately \$1.18 million in tariff fees every month, which would be the monthly exposure to the District if all of the tariff fee paying tenants requested a deferral each month. To qualify for this program, tenants must be considered a tenant in good standing under Board Policy No. 355 and show evidence of delayed payment from manufacturers or suppliers or other evidence of financial hardship.

Supporting the financial stability of District tenants during this time of economic uncertainty is critical to the continued stability of the District itself, as the District depends on rents from the tenants to operate as a self-sustaining agency. Therefore, staff recommends that the Board adopt a resolution establishing a temporary rent deferral program for qualifying fixed rent tenants and tariff fee paying tenants allowing deferral of certain rental and tariff payments based on the criteria set forth herein and any administrative policies adopted by the Executive Director, or her designated representative, to implement the program.

If the Board approves this rent deferral program, the Executive Director would have full authority to implement it and no further Board action would be required. If, in the future, economic conditions change, staff could return to the Board with modifications to the program if needed. Staff is continuing to explore alternatives to address individual tenant situations within the District on an as-needed basis and will return to the Board in the future for direction, if necessary.

RECOMMENDATION:

Adopt a Resolution Establishing Temporary Rent Deferral Program for Qualifying Fixed Rent Tenants and Tariff Fee Paying Tenants Allowing a Temporary Suspension of Certain Rental and Tariff Payments

FISCAL IMPACT:

The fiscal impact of the proposed item is approximately as follows:

	Fiscal Year 2020	Fiscal Year 2021	Total Fiscal Impact
Fixed Rent Deferral	(\$1,021,433)	(\$2,042,867)	(\$3,064,300)
Fixed Rent Repayment	\$0	\$3,064,300	\$3,064,300
Total	(\$1,021,433)	\$1,021,433	\$0

The maximum potential combined deferral amount in Fiscal Year 2020 and Fiscal Year 2021 is \$(3,064,300) all of which is expected to be repaid gradually by the end of Fiscal Year 2021. In addition, deferral of tariff fees of up to approximately \$(1,182,000) are expected to be repaid within 30 days after the normal due date, which would happen prior to the end of Fiscal Year 2021. Additional details regarding the fiscal impact are described below.

COMPASS STRATEGIC GOALS:

This agenda item supports the following Strategic Goal(s).

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.
- A financially sustainable Port that drives job creation and regional economic vitality.

DISCUSSION:

To assist District tenants with the economic impacts of COVID-19, staff recommends the District partner with its tenants to assist with their continued viability, which in turn will ensure the economic viability of the District during and after the pandemic. Staff has prepared a temporary rent deferral program for certain fixed rent tenants, excluding the San Diego International Airport, and tariff fee paying tenants to provide financial assistance to District tenants. This program, referred to as the Fixed Rent Tenant Deferral Program, is intended to cover the balance of the maritime and real estate portfolios so that the majority of tenants in need have access to a rent deferral program. Staff recommends that the Board authorize this temporary rent deferral program to assist those fixed rent tenants and tariff fee paying tenants impacted by the COVID-19 pandemic.

Concession Tenant Rent Deferral Program Update

The Concession Tenant Rent Deferral Program, approved at the April 8, 2020 Special Board Meeting, offered qualifying Concession Tenants the ability to defer minimum rent payments for the rental paying months of March, April and May, or, in the case of Seaport Village tenants, February, March and April. Repayment begins in January 2021 and may be divided evenly over the following six months or paid in a lump sum. No interest or late fees will be applied to the deferred amounts if they are paid in full during the six-month repayment period. The total estimated maximum deferral amount under this program is \$6.18 million in Fiscal Year 2020 with all but approximately \$240,000 expected to be repaid in Fiscal Year 2021. That estimated maximum deferral total includes an additional \$31,000 deferral for the parking tenant JAMR which was not included in the original estimate.

Prior to rolling out the implementation plan for the Concession Tenant Rent Deferral Program, staff met with members of the SDPTA's executive committee on

April 15, 2020 to provide an overview of the implementation plan, and received positive feedback. To execute the program, on April 16, 2020, staff added a "Temporary Rent Deferral Program" section to the Tenant Resource page on the District's website. Staff then emailed the link to the SDPTA and Protea Property Management to distribute. Staff also reached out to each of the concession and Seaport Village tenants individually to initiate discussions and determine interest in the program. Within one business day, all requests received from tenants were reviewed. Once tenants submitted the necessary information, staff confirmed the information was complete and proceeded to draft conditional approval letters, with the commitment of issuing them to tenants within 14 days, although most were issued within a week. As staff continued to process the active applications, they continued to follow-up with those tenants that had not yet submitted an application to determine if they had questions, needed additional time or did not desire to participate in the program. As of May 12, 2020, all of the potentially eligible Concession Tenants that were interested in applying for the Concession Tenant Rent Deferral Program had submitted their applications, other than one Concession Tenant that needed additional time. Applications from Seaport Village tenants continue to trickle in.

As of May 12, 2020, 27 Concession Tenants and 28 Seaport Village tenants have applied for the program representing approximately \$2.81 million and \$540,000 in potential deferral amounts, respectively, or about half of the total maximum estimated deferral under the Concession Tenant Rent Deferral Program. The Concession Tenant total includes an additional \$31,000 in potential deferral for the parking tenant JAMR which was not included in the original estimate provided to the Board but qualifies for the Concession Tenant Rent Deferral Program. About 60% of the deferred amount is attributable to hotel tenants and another 15% to Seaport Village tenants. 41 Concession Tenants and 22 Seaport Village tenants have indicated that they will not be submitting applications.

Staff is also negotiating a rent deferral with a parking operator, ACE Parking, that is experiencing financial hardship as a result of the pandemic. The criteria that ACE Parking will need to meet to get the deferral will be similar to the Concession Tenant Rent Deferral Program. Staff is also continuing to assess each tenant situation on a case by case basis and may return to the Board in the future with a different program to address tenants on a case by case basis if the need exists and the effects of the pandemic persist, and direction is required from the Board.

Proposed Fixed Rent Tenant Deferral Program

The proposed program was developed based on input from tenants, multiple meetings with an SDPTA focus group of fixed rent tenants and tariff fee paying tenants, and lessons learned from the Concession Tenant Rent Deferral Program. As with the previous program, the Fixed Rent Tenant Deferral Program attempts to balance the need for immediate assistance for tenants in the District's portfolio, most of whom are struggling with reduced business and closures, with the needs of the District in meeting its fiduciary and legal duties and obligations in this fiscal year and the years ahead. Examples of fixed rent tenants are boatyards, easement holders (e.g., existing tenants, utilities, and other third parties), landscape tenants, marine tenants, pier tenants, rental car tenants, maritime tenants and tenant parking. The proposed program provides immediate relief to fixed rent tenants by deferring half of monthly rent due for an up to three-month consecutive period to be paid back beginning in January 2021. In addition, tariff fee paying tenants would be given an extra 30-

days to submit monthly payments during the tariff paying months of May to December with no late fees or interest. The details of the proposed program are discussed below.

Fixed rent tenants excluding the airport

The proposed program would allow a deferral of 50% of fixed rent that could be applied to up to three consecutive rental paying months between June through December and be paid back over a six-month period beginning in January 2021 with no interest or late fees.

The details would be as follows:

- Applies to tenants paying fixed rent
 - Fixed rent is fixed rent only, fixed rent and improvement rent, or hybrid situations in which the tenant pays concession rent and improvement rent.
 - Tenants with fixed rent and improvement rent may seek deferral on both amounts.
 - Tenants paying both concession rent and improvement rent under the same agreement could qualify for both deferral programs.
 - Airport is excluded as a qualifying tenant under this program.
- Tenants may defer up to 50% of monthly fixed rent for up to three consecutive months between the rental paying months of June through December 2020, at tenant's option.
 - If a tenant qualifies for deferral after October 1, only the remaining two months of rent could be deferred (rental paying months of November and December)
 - The longer deferral window is intended to provide relief in the event of a sudden shutdown due to a COVID-19 outbreak amongst staff between May and November, or for tenants that do not experience economic hardship in the current COVID-19 phase based on their position in the supply chain.
- Payback begins January 2021 over six months or lump sum.
- No interest or late fees would be applied to the deferred amounts if they are paid in full during the payback period. The District reserves its right to pursue any and all remedies for any failure to pay rent pursuant to this program, including any rights that the District would have had at the commencement of the rent deferral program should the tenant not have qualified for the program.

Conditions applicable to fixed rent tenants seeking rent deferral

To qualify for the proposed rent deferral program, staff proposes that the tenant meet all of the following conditions:

- Provide evidence of financial hardship (evidence can be any one of the following):
 - Delays from suppliers or manufacturers
 - Full or partial shutdown
 - Decline in gross revenues
- Be considered a tenant in good standing pursuant to Board Policy No. 355 and remain a tenant in good standing throughout the program
- Apply for state and federal aid
- Provide proof of application for state and federal aid (if proof is not available, tenants shall certify that they have applied to applicable programs by signing letter agreement from District)
- Diligently pursue application and provide notice of determination
- Accept state, federal, or both types of aid if offered
- All deferred rent must be repaid in full on or before June 20, 2021

Tariff fee paying tenants

The proposed program would allow tenants paying tariff fees, such as Pasha and commercial fishermen, a 30-day grace period for each of the tariff paying months of May through December to submit payment with no late fees or interest. Tariff fees are paid in arrears meaning that if a tariff fee paying tenant elects to defer payment in May, that payment would have been for tariffs incurred in April.

The details would be as follows:

- Applies to tenants/customers paying fees under a tariff program, including commercial fishermen at Tuna Harbor
- Late fees waived for 30-day period for each tariff paying month of May 2020 through January 2021
- No interest on late payments on each monthly deferral if repaid within 30-day deferral period

Conditions applicable to tariff fee paying tenants seeking tariff fee deferral

To qualify for the proposed tariff fee deferral program, staff proposes that the tenant meet all of the following conditions:

- Provide evidence of financial hardship (evidence can be any one of the following bullets):
 - Delays from suppliers or manufacturers

- Full or partial shutdown
- Decline in gross revenues
- Be considered a tenant in good standing pursuant to Board Policy No. 355 and remain a tenant in good standing throughout the program;
- Since payment would be received within 30 days, staff recommends not conditioning the program on application to state and federal aid; and
- If tenant fails to repay the tariff within the 30-day deferral period, tenant would not be eligible for further deferrals under the program.

The Executive Director, or her designated representative, would have the authority to adopt administrative policies reasonably necessary to implement the rent deferral program, including without limitation, adopting definitions of “financial hardship” and developing an application and any associated process for evaluating those applications against the program’s requirements. In the event that the State of California issues guidance on defining any terms that staff adopts, staff may revise the administrative policies as needed to reflect such state guidance.

Fiscal Impact of the Fixed Rent Tenant Deferral Program

Staff prepared an analysis of the estimated economic impact to the District of its recommended rent deferral program as described above in the “Fiscal Impact” section. The analysis, shown as Attachment A, and summarized below, is broken down by sector for a more granular look at the economic impact across the fixed rent tenant portfolio (but excluding the Airport) and it assumes that all fixed rent tenants would opt into the program. This is unlikely to happen as was the case with the Concession Tenant Rent Deferral Program. Overall, the estimated total impact for Fiscal Year 2020 and Fiscal Year 2021 is revenue neutral to the District, as reflected in the Fiscal Impact section above, since the proposed program is a deferral of rent or tariffs only which would require that the rent or tariff be paid back in Fiscal Year 2020 or 2021. The maximum potential combined deferral amount in Fiscal Year 2020 and Fiscal Year 2021 is \$(3,064,300) all of which is expected to be repaid in Fiscal Year 2021. In addition, deferral of tariff fees of up to approximately \$(1,182,000) are expected to be repaid within 30 days from each monthly deferral granted.

As shown on Attachment A, the majority of the total deferral, if all fixed rent tenants participated, would be attributable to industrial tenants, primarily Solar Turbines Incorporated, shipyards such as NASSCO and BAE Systems San Diego Ship Repair, Inc. and other maritime tenants such as Dole Fresh Fruit Company and Searles Valley Minerals, Inc. It is worth noting that most of these tenants continue to operate at full capacity, and may not have endured financial hardship, which means that they may or may not apply for the program. Most of the relief requests that the District has received have come from smaller boatyards, such as Driscoll Boatworks and Shelter Island Yachtways, Ltd. and tenants paying improvement rent such as Hornblower Yachts, LLC, which makes up a much smaller proportion of the overall potential deferral. However, staff wanted to make the option available to even the larger tenants, which as staff has seen with hotel tenants under the Concession Tenant Rent Deferral Program, may still be affected by the pandemic.

Implementation

As with the previous program, if the Board approves the proposed rent and tariff deferral program, staff will notify tenants via the District website to determine the level of interest in such a program. Staff will also share a link to the District's website with the SDPTA to disseminate to its membership. The outreach will include an outline of the rent deferral program and the conditions that must be met to participate in the program. If the rent and tariff deferral program is approved by the Board, staff will use a similar Standard Operating Procedure as that developed for the Concession Tenant Rent Deferral Program to outline the process for applying, criteria for eligibility and the mechanism by which the District and tenant memorialize the terms of the rent or tariff deferral, which would be tracked in the District's lease administration system. The Executive Director, or her designated representative, would have the authority to adopt administrative policies reasonably necessary to implement the rent and tariff deferral program. Staff would regularly update the Board on the status of the program, including the number of tenants participating as well as the total amount of rent or tariffs deferred and repaid each month.

Recommendation and Next Steps

In closing, staff recommends that the Board authorize a resolution establishing a temporary rent and tariff deferral program for qualifying fixed rent tenants and tariff fee paying tenants allowing deferral of payments based on the criteria set forth herein and any administrative policies adopted by the Executive Director, or her designated representative, to implement the program.

If the Board approves this rent deferral program, the Executive Director would have full authority to implement it and no further Board action would be required. If, in the future, economic conditions change, staff could return to the Board with modifications to the program if needed. Staff is continuing to explore alternatives to address individual tenant situations within the District on an as-needed basis and will return to the Board in the future as necessary for direction.

General Counsel's Comments:

The Office of the General Counsel has reviewed this agenda sheet as presented to it and approves it as to form and legality.

Environmental Review:

The proposed Board action and the Board's direction, including without limitation, a resolution establishing a temporary rent relief program for qualifying tenants allowing deferral of certain lease required rental payments and direction to staff, do not constitute a "project" under the definition set forth in California Environmental Quality Act (CEQA) Guidelines Section 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of the proposed Board action and the Board's direction that requires the District or the Board's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation measures, adopting an alternative, including without limitation, a "no project alternative" or adopting a Statement of Overriding Consideration, if required. The proposed Board action and the Board's direction in no way limit the exercise of this discretion. Therefore, no further CEQA review is required.

The proposed Board action and the Board's direction comply with sections 21, 35, and 87(b) of the Port Act, which allow the Board to pass resolutions, to do all acts necessary and convenient for the exercise of its powers, and to collect and retain rents and other revenues from the leasing, franchising, and privileging of District tidelands. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action and the Board's direction are consistent with the Public Trust Doctrine.

The proposed Board action and the Board's direction do not allow for "development," as defined in Section 30106 of the California Coastal Act, or "new development," pursuant to Section 1.a. of the District's Coastal Development Permit (CDP) Regulations because they will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a Coastal Development Permit or exclusion is not required. However, development within the District requires processing under the District's CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District's certified CDP Regulations, PMP, and Chapters 3 and 8 of the Coastal Act. The proposed Board action and the Board's direction in no way limit the exercise of the District's discretion under the District's CDP Regulations. Therefore, issuance of a CDP or exclusion is not required at this time.

Equal Opportunity Program:

Not Applicable.

PREPARED BY:

Tony Gordon
Director, Real Estate

Joel Valenzuela
Director, Maritime

Attachment(s):

Attachment A: Fiscal Impact of Fixed Rent Deferral Program by Category